IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 741 of 1990

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANUBHAI K PATEL

Versus

THAKOR ANARJI RAVAJI

Appearance:

1. Special Civil Application No. 741 of 1990

MR JS YADAV for Petitioner No. 1

MR PK JANI for Respondent No. 1

RULE SERVED for Respondent No. 2

MS DS PANDIT, Ld. AGP for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 13/10/2004

ORAL JUDGEMENT

1. The short facts of the case are that the petitioner applied for converting the land for non-agricultural purpose under Section 65 of Bombay Land Revenue Code (hereinafter referred to as the "Code") for the land bearing Survey No.1990/102, No.1990/105 of T.P. Scheme No.1 of Final Plot No.51, admeasuring the total area of about 8799 sq. mtrs. It appears that the petitioner simultaneously applied for development permission to the Town Planning Authority and as the land was situated within the residential zone, the permission was granted by Town Planning Authority for development of the land. The aforesaid permission came to be granted on 18.1.1988. The procedure for obtaining NOC from the concerned authority was followed. However, so far as Mehsana Municipality is concerned, it had objected on the ground that the over the Plot No.124 there are constructions of hutments. The petitioner herein by submitting the application on 10.6.1988 declared before the Collector for excluding the area which is under the occupation of the hutmen for the permission under Section 65 of the Code/Act. It appears that the Collector ultimately passed the order on 2.8.1988, whereby permission for the land admeasuring 6841 sq. mtrs. was granted, excluding the area under the occupation of the hutmen.

2. It is the case of the petitioner that respondent No.1 who is one of the hutmen preferred revision before the State Government being Revision Application No.5/1988 against the order of the Collector for granting permission for non-agricultural purpose and in the said revision, the State Government ultimately after hearing both the sides found that when the portion of the land was used by hutmen for residential purpose, it was in breach of the condition of agricultural purpose and it was required for the Collector to take action for imposing of penalty and to recover the same and thereafter if the payment of the penalty is made, it could have been considered by the Collector for considering the matter for non-agricultural purpose and, therefore, the State Government in exercise of the revisional jurisdiction set aside the order dated 2.8.1988 passed by the District Collector and further directed the District Collector to take action for unauthorised used of the land other than agricultural purpose and to complete the process within a period of three months. It is under these circumstances, the petitioner has approached this Court by preferring this petition.

3. Heard Mr.Raval, learned Counsel appearing with

Mr.Yadav for the petitioner, Mr.Jani, learned Counsel for respondent No.1 and Ms.D.S.Pandit, learned AGP for respondents No.2 and 3.

4. It has been submitted by Mr.Raval, learned Counsel appearing for the petitioner that as such respondent No.1, who was one of the hutmen over the area of the land had no locus to challenge the order passed under Section 65 of the Code, which was in favour of the original owner of the land who is the petitioner herein and he further submitted that even if the question of locus is not considered, the State Government had no jurisdiction to entertain the revision and in support of the said submission he contended that as per Section 117(1)(A) of the Gujarat Town Planning and Urban Development Act (hereinafter referred to as the "T.P. Act") once the land was situated in the residential zone and the permission for development was granted by the Town Planning Authority, the permission for N.A. as such was not required in view of the decision of this Court reported in 1996(1) GLR, 659 and he submitted that the amendment is made of deleting Clause (A) from Section 117(1) after the impugned order is passed and, therefore, he submitted that as such it was not required for the petitioner to apply for permission under Section 65 of the Code, but even if such permission is applied and is granted, the State Government in revisional jurisdiction could not be said to have authority to entertain at the instance of one of hutmen, who were unauthorisedly occupying the land. In support of the said submission he further contended that the State Government was exercising the power under Bombay Land Revenue Code and, therefore, while considering the matter for such purpose, it could not have jurisdiction in respect to the use of the plot in T.P. Scheme which is to be finalised as per the T.P. Act which is another enactment and in support of the said submission, he relied upon the decision of this Court in case of "Evergreen Apartment Co-operative Housing Society Ltd. v. Special Secretary (Apeals), Revenue Department", 1991(1) GLH, 155. Mr.Raval further submitted that pending the petition as the interim stay was granted staying the earlier order of the Secretary of the State Government (impugned order at Annexure "B"), the petitioner has developed the land and for supporting the said submission he relied upon the papers of MCA No.347/2002 in SCA o.741/1999 in which a copy of the notice dated 27.11.2001 issued by the District Collector is produced for removal of the construction over sub-plots No.4, 5, 7, 8, 10, 11, 12 and 17, and is used for non-agricultural purpose. The aforesaid notice was issued by the District Collector, because SCA No.741/1999

i.e. present petition was dismissed for default on 3.4.2000, which of course subsequently as per the order dated 22.4.2000 passed by this Court (Coram: M.S.Shah, J.) is restored and, therefore, Mr.Raval submitted that the impugned order passed by the State Government deserves to be quashed and set aside.

5. On behalf of respondent No.1, it has been submitted by Mr.Jani, learned Counsel that as such the statement made in the petition is that the application was submitted by the petitioner under Section 65 of the Code for non-agricultural purpose on 10.6.1988, and the order passed by the Collector also speaks for the said application of 10.6.1988, whereas in the impugned order it has been recorded by the State Government that the application was filed on 18.12.1987 and, therefore, he submitted that this shows that the Collector has acted upon a different application and no objection certificates were obtained by the petitioner from the authority concerned prior to the date of the application. He submitted that the aforesaid infirmities can be said as illegal in exercise of the power under Section 65 of the Code by the District Collector. Mr.Jani also submitted that even if it is considered that respondent No.1 has no locus to prefer the revision, then also as the matter pertains to administration at the level of District Collector and if the State Government has exercised the power based on the same, this Court cannot ignore the said aspect while considering the matter under Article 226 of the Constitution of India. Mr.Jani submitted that as such in the record of SCA, there is no material produced by the petitioner to support that after the interim order is passed in this petition, the land is used for non-agricultural purpose and is further developed and he, therefore, submitted that the order passed by the State Government does not call for interference by this Court in exercise of power under Article 226 of the Constitution.

6. Ms.Pandit, learned AGP has supported the order passed by the State Government in revisional jurisdiction.

7. Having considered the above, it appears that the contention as sought to be canvassed on behalf of the petitioner that the State Government had no jurisdiction under Section 211 of the Code while hearing the revision or that no permission was required under Section 65 of the Code in view of the development permission already granted by the T.P. Authority, cannot be accepted for the simple reason that the petitioner himself has applied

for permission under Section 65 of the Code for non-agricultural purpose. Once a party who has invoked the jurisdiction under Section 65 of the Code cannot be heard to say that there was no jurisdiction with the District Collector under Section 65 merely because at the revisional jurisdiction the order is passed against such party. It is well settled that one cannot blow hot and cold at the same time and in the present case even after the permission was granted under the T.P. Act, the petitioner has applied for permission under Section 65 of the Code and, therefore, as the petitioner has invoked the jurisdiction and has applied to the District Collector such contention from the mouth of the petitioner cannot be accepted that no permission under Section 65 of the Code was required.

8. It is well settled that the power of the authority under Section 65 of the Code for granting permission for non-agricultural purpose is having the administrative character and, therefore, the scope of judicial scrutiny for such purpose will have to be restricted accordingly. The reference may be made to the decision of this Court (Coram: R.C.Mankad, J.) in the case of "M/s.Yashkamal Builders, Baroda v. State of Gujarat and Anr.", reported in 1989(1) GLR, 382. Therefore, so far as Respondent No.1 is concerned, there is no dispute that he was one of the occupant as hutmen over a portion of the land for which initially the permission was applied which included the total area. It appears that the application dated 10.6.1988 for which the reference is made in para 10 of the order of the Collector refers to the request for grant of permission by excluding the area under the occupation of the hutmen of Plot No.124 and, therefore, if the Collector has acted upon the application dated 10.6.1988 by excluding area which was in occupation of the hutmen, it cannot be said that as such such a irregularity is so serious which would frustrate the very object of applying for permission under Section 65 of the Code and the intention of the legislature for grant of such permission in this regard. The perusal of the order passed by the District Collector shows that the concerned authorities have not objected to the grant of permission except Mehsana Municipality and such objection on the part of the Municipality was also in view of the occupation by hutmen over a portion of the land which is sought to be excluded even in the order of the Collector. Therefore, if the Collector has considered the application dated 10-6-1988 with reference to the earlier application of the petitioner dated 18.12.1987 and consequently if the area which is in occupation of the hutmen is excluded for

grant of permission under Section 65 of the Code, it cannot be said that the order passed by the District Collector would be rendered illegal. Therefore, when the proper procedure is followed and no major illegality is demonstrated and when the character of exercise of power under Section 65 of Code is as administrative, in my view, it would not be proper to conclude that the District Collector has committed illegality while granting permission for non-agricultural purpose merely because the reference is made of the application dated 10-6-1988 and there is no reference to the first application dated 18.12.1987 and, therefore, the contention of Mr.Jani cannot be accepted for such purpose.

9. On the question of locus of respondent No.1 to prefer the revision before the State Government against the order granting permission under Section 65 is concerned, as observed earlier, keeping in view the character of the power as administrative under Section 65 of the Code, while granting permission, respondent No.1 could not have asserted as of right that the hearing was required to be given. Further, so far as the land which was in occupation of respondent No.1 is concerned, the same is excluded together with the land under the occupation of the other hutmen, for grant of permission under Section 65 and, therefore, it cannot be said that respondent No.1 as such can be said as aggrieved by the order passed by the Collector under Section 65 of the Act. In any event, the State Government in exercise of the revisional jurisdiction, could have considered the said aspect but it appears that the same is not considered by the State Government and the matter is examined as if respondent No.1 has right to carry the matter in revision as the person interested or the person affected by the order of the Collector.

10. Further, the State Government in exercise of the revisional jurisdiction in the impugned order has stated that certain area was under the occupation of the hutmen and used for non-agricultural purpose of residential use. If any person encroaches over the property of the owner against the will and desire, then such circumstances cannot be read as adverse disentitling him to apply for permission under Section 65 of the Code. Had it been a voluntary action on the part of the owner of the property or a permissive act for using the land in breach of the provisions of the Section 65 of the Code, it may stand on a different footing. But if the encroachments are made over the property against the will and desire of the owner, it cannot be said that the owner would be

disentitled to apply for conversion even for the balance of the land, nor can it be said that unless and until the penalty is recovered qua the land over which the constructions were made by the hutmen, the permission cannot be granted for converting the purpose for the remaining land. I am inclined to take such view because of the peculiar circumstances that it is the case of the petitioner who is the owner of the property that the hutmen are unauthorised occupants and further he voluntarily declared before the Collector to exclude the area under the occupation of the hutmen for the purpose of grant of permission of non-agricultural purpose. Not only that but in the proceedings of SCA No.2870/2002, which was preferred by the petitioner this Court as per the order dated 9.4.2003 had prima facie found that there are encroachments over the land of the petitioner and it is the duty of the Town Planning authority to take steps for removal of the encroachment and, therefore, it is not a case where the owner of the last has voluntarily permitted the hutmen to occupy and it was a case for encroachment of the land against the will and desire of the owner of the property. Such circumstances as observed earlier cannot disentitle the owner of the property for requesting the authority to grant for permission for non-agricultural purpose for the balance or remaining land. Contrary view is taken by the State Government in the revisional jurisdiction and the order of the Collector is set aside with the direction that the steps be taken for removal of unauthorised use and to recover penalty etc., which can be said as an error apparent on record for exercise of jurisdiction by State Government. This does not mean that the order could not have been passed by the State Government once unauthorised use or occupation is brought to the notice, but on such ground, certainly the order passed for grant of permission for the remaining land could not have been set aside by the State Government. Further, there is no dispute on the point that now the encroachments which were made by the hutmen are removed in pursuance of the order passed by this Court in the proceedings of SCA No.2870/2002 and, therefore, there would not be any further steps required for taking action against unauthorised use, which has been referred to in the impugned order of the State Government.

11. In view of the aforesaid impugned order dated 3.4.1989 passed by the State Government deserves to be quashed and hence is quashed and set aside.

12. The petition is allowed to the aforesaid extent. Rule is made absolute accordingly. Considering the facts

and circumstances, there shall be no order as to costs.

13-10-2004 (Jayant Patel, J.)

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